BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JOHN DAVID MAY	)	
Claimant	)	
V.	)	
	)	
GARLAND FIRE DEPARTMENT, DIST. 2	)	
Respondent	)	Docket Nos. 1,072,323;
AND	)	1,074,764 & 1,074,765
	)	
RIVERPORT INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the September 9, 2016, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 22, 2015, preliminary hearing and exhibits thereto; the transcript of the April 6, 2015, preliminary hearing; the transcript of the March 25, 2015, deposition of claimant; and all pleadings contained in the administrative file.

There is no August 26, 2016, preliminary hearing transcript in the file. The September 9, 2016, Preliminary Hearing Order states, "NOW, on this the 26th day of August, 2016, the above captioned matter came on for hearing . . . ."[1] Claimant's attorney sent records of Drs. Edward J. Prostic and Lowry Jones, Jr., to the ALJ for review. Dr. Prostic was hired by claimant's counsel to evaluate claimant and Dr. Jones evaluated claimant at the ALJ's request. Respondent's submission letter to the ALJ mentioned records from Mercy Hospital at Fort Scott, Via Christi at Pittsburg and Drs. Jonathan L. Grantham, Prostic, Jones and Rodney K. Odgers. Respondent's submission letter also indicates medical records relating to a 2003 work injury were attached thereto. The ALJ's Preliminary Hearing Order discusses records from Mercy Hospital, Drs. Grantham, Prostic,

[1] ALJ Order (Sept. 9, 2016) at 1.

and Jones and Gretchen L. Martin, PA. The parties have agreed no preliminary hearing was held on August 26. Neither claimant nor respondent objected to the Board considering the aforementioned medical records. Therefore, the undersigned Board Member will consider the medical records[2] of:

- Mercy Hospital, Fort Scott
- Via Christi, Pittsburg (Ms. Martin)
- Dr. Odgers
- Dr. Prostic
- Dr. Jones
- Dr. Grantham
- medical records related to claimant's 2003 work injury from Mount Carmel Regional Medical Center, Pittsburg (Dr. John G. Yost and Greg J. King, ARNP) and Open MRI of Pittsburg (Dr. Sandor Dean Papp, Jr.)

ISSUE

In Docket No. 1,072,323, did claimant suffer a right shoulder injury by accident or by repetitive trauma on November 19, 2014, arising out of and in the course of his employment?

FINDINGS OF FACT

Claimant's application for hearing alleged he suffered neck, right shoulder, arm and elbow injuries on November 19, 2014. The exact cause and specific source of the accident/disease is listed as performing the duties of a volunteer firefighter. The application for hearing does not state if claimant is alleging a single traumatic injury or an injury by repetitive trauma. Two very brief preliminary hearings were conducted by former ALJ Brad E. Avery on April 6 and May 22, 2015, but the issue of whether claimant was alleging an injury by accident or an injury by repetitive trauma never arose.

Claimant testified he previously dislocated his right shoulder in a motorcycle accident when he was 16. He also dislocated his right shoulder in a Texas work accident when he was 18 and received a settlement of $601.

Claimant again injured his right shoulder in 2003 while working for CM Flooring and Construction (CM). Claimant testified he had more than one right shoulder surgery to repair his rotator cuff. He settled his workers compensation claim from said injury. Before November 2014, he had not received treatment on his right shoulder since recovering from the 2003 injury. Claimant has worked for CM, owned by his wife, for 20 years. He has not

[2] These records are attached to respondent's brief to the Board and/or are in the administrative file of Docket No. 1,072,323.

worked for a year because CM has not had any jobs due to a lack of business. His duties included removing and installing floors and ceilings. He also framed, built, removed, painted and wallpapered walls, which included installing drywall.

Claimant has been a volunteer firefighter for respondent since March 2013 and fire chief since 18 months prior to his March 2015 deposition. As fire chief, he inspects and maintains all firefighting equipment and the fire station, but is not in charge of personnel. He also fights fires, but has not gone on a fire call since January 2014.

Claimant testified that on November 19, 2014, he was performing his maintenance schedule and respondent was preparing for a Westar electrical show. Claimant was restocking a fire pumper truck with foam in case an electrical fire occurred at the electrical show. In order to fill the pumper truck, claimant carried up a ladder five-gallon buckets of foam concentrate, weighing 65 pounds, and dumped them into the truck's tank. Claimant testified that on his third trip up the ladder, he lost his grip on the bucket of foam. The bucket slipped back, wrenching claimant's right shoulder. He heard a pop and felt pain from his neck down through his right shoulder and into his hand and fingers. Claimant put the bucket down and reported the injury to Kevin Howard, who is the fire board chairman and, as such, is his supervisor. Claimant also told his wife, also a firefighter and a fire board member, of the injury. Claimant remained at the fire station the remainder of the day, but rested.

That night, claimant telephoned Howard and said his right shoulder was "hurting pretty bad."[3] Howard told claimant to go to the hospital if he needed to do so. Claimant stayed home and put hot packs on his right shoulder. Claimant did not seek medical treatment until after he called Howard again on November 22 and was told to go to urgent care.

Claimant went to Mercy Hospital in Fort Scott on November 22 and he received an injection for pain. Claimant indicated that the next day, he went to Via Christi in Pittsburg where he received another injection and underwent an imaging study. Claimant testified he later saw Dr. Grantham, who gave him a cortisone injection in the shoulder and prescribed physical therapy, which respondent refused to authorize.

Mercy Hospital's November 22, 2014, records state claimant reported right shoulder pain after two days of lifting, pushing and pulling activities while setting up for a chili cook-off in his capacity as fire chief. It was noted he reported no specific trauma.

November 22, 2014, Via Christi records reflect claimant reported right shoulder pain beginning Wednesday. Claimant indicated he overworked his right shoulder Monday and Tuesday while working at the firehouse. Claimant reported performing activities he

[3] Claimant Depo. at 37.

normally did not perform, including repetitive motions above shoulder height. He denied a recent known injury.

Dr. Grantham's December 9, 2014, records noted claimant presented to the clinic complaining of right shoulder pain beginning on November 19. Claimant was working at the fire station doing several tasks around the station without pain, but that evening and especially into the next morning had significant pain and loss of shoulder motion. In a letter dated December 11, 2014, the doctor stated claimant had significant glenohumeral osteoarthritis and given his lack of a specific incident leading to his pain and the nature of his pain, the osteoarthritis was the prevailing factor for his symptomatology.

At the request of his counsel, claimant was evaluated by Dr. Prostic on January 23, 2015. Claimant gave a history of repetitively carrying 60-pound buckets of foam up a ladder to load a truck and developing progressive right shoulder pain. The doctor noted claimant underwent x-rays at Mercy Urgent Care, Via Christi and Dr. Grantham's office as well as a CAT scan and MRI of the shoulder. The doctor diagnosed claimant with at least partial thickness tearing of the right rotator cuff and opined claimant's work injury was the prevailing factor causing his injury, medical condition, need for medical treatment and resulting disability.

On July 9, 2015, Dr. Jones evaluated claimant at the request of the ALJ. Claimant reported carrying five-gallon buckets of liquid foam onto a fire truck. As claimant was carrying his second bucket over his shoulder, it slipped and he hyperextended his shoulder. Claimant felt a very sharp pain in his right shoulder. The doctor noted claimant's MRI did not show evidence of a large rotator cuff tear and he recommended an EMG and possibly a right shoulder post arthrogram MRI. The doctor noted claimant had some mild degenerative changes that did not explain his present findings.

Dr. Jones diagnosed claimant with a brachial plexus or neurologic injury resulting in right rotator cuff weakness. The doctor opined claimant had a specific injury on November 19, 2014, which was the prevailing cause for his clinical findings and need for medical treatment.

The ALJ authorized the EMG recommended by Dr. Jones. On March 22, 2016, Dr. Jones met with claimant to discuss the EMG results. The doctor noted the EMG was essentially normal. The doctor recommended a post arthrogram MRI. On April 18, 2016, Dr. Jones met with claimant to go over the MRI results. The MRI showed a partial tear of the subscapularis with biceps tendon dislocation. Dr. Jones believed most of claimant's pain was due to his biceps condition. The doctor recommended surgical treatment, including a biceps tenodesis, subscapularis debridement or repair and acromioplasty.

The ALJ denied claimant's request for medical treatment, stating:

> Normally, an IME opinion, particularly from a respected source such as Dr. Jones, weighs heavily in breaking a seeming tie of opinions between doctors. In this case, however, an unusual circumstance tempers immediate acceptance of Dr. Jones's prevailing factor findings. The facts recited in the IME describe an accident event which, while *generally* consistent with all previous accounts, is at least somewhat inconsistent in that it details a traumatic event as [opposed] to a repetitive event. This variation in detail may make no significant medical difference, but given Claimant's history of shoulder problems, traumatic [versus] repetitive may be very significant. That fact simply is unknown.
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> What is known, or at least can be comfortably deduced from context, is that Dr. Grantham views repetitive [versus] traumatic injuries as significant in determining prevailing factor. In his December 11, 2014 letter, Dr. Grantham appears to [premise] his entire finding on the absence of a traumatic event.
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> Given this, what really happened? Was there a singular event carrying a bucket up a ladder that created immediate pain as described in deposition or was there "overworking (of) his shoulder"... "after having [*sic*] lifting, pushing and pulling activities on Tuesday and Wednesday"... "without any pain perceived at the time." as recorded in the medical records?
>
> Respondent[']s cover letter of September 2, with great skill, paints these differing accounts in the darkest of hues and suspicions. And, it is true that some people, even under oath, lie. It is also, true that accounts repeated by second parties are subject to a degree of editing and interpretation, if not honest misunderstanding, which can create the appearance of inaccuracy or a lie, when in fact, none exists. That acknowledged, since Claimant has the burden of proof, it is incumbent upon him that he present at least evidence that passes the preponderance standard that:
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> 1. It makes no significant medical difference in determining prevailing factor if Claimant suffered repetitive overuse/overexertion or a singular, traumatic event.
>
> and/or;
>
> 2. Claimant did, in fact, have a singular, traumatic event as described in deposition and detailed in the IME, and as such, Dr. Jones' prevailing factor opinion should stand.
>
> Proving---or defeating-- either of these propositions should not be insurmountable. Dr. Jones undoubtedly could address the first. As to the second, while there were no immediate, direct eyewitness[es] to the alleged event on the ladder, there are at least two potential witnesses in the fire station to whom the Claimant discussed his problems with the same day they occurred. (Depo., p. 35)

> To the degree they are available and have a memory of the event, they might be quite helpful.
>
> Undoubtedly, given the skills of both lawyers involved, other avenues of proof and/or defense also exist. Unless or until such evidence is presented, the current requests of the Claimant are denied.[4]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[6]

K.S.A. 2014 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(e), in part, states:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

Claimant testified he sustained a single traumatic accident. He reported different mechanisms of injury to medical providers. Claimant reported having no specific traumatic injury to Mercy Hospital, Via Christi, Dr. Grantham and Dr. Prostic. Conversely, he reported having a single traumatic injury to Dr. Jones.

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[4] ALJ Order (Sept. 9, 2016) at 4-5.

[5] K.S.A. 2014 Supp. 44-501b(c).

[6] K.S.A. 2014 Supp. 44-508(h).

Drs. Prostic and Jones opined claimant's work injury was the prevailing factor causing his right shoulder injury and need for medical treatment. Dr. Grantham differed by opining the prevailing factor for claimant's right shoulder condition was glenohumeral osteoarthritis. This Board Member finds the prevailing factor opinion of Dr. Grantham less credible than the opinions of Drs. Jones and Prostic. Dr. Prostic suspected claimant had at least partial thickness tearing of the rotator cuff. Dr. Prostic's opinion was corroborated by claimant's post arthrogram MRI ordered by Dr. Jones, which showed a partial tear of the subscapularis with biceps tendon dislocation. When Dr. Grantham gave his prevailing factor opinion, he did not have the benefit of said MRI. Moreover, Dr. Jones' finding that claimant had mild degenerative changes disputes Dr. Grantham's incorrect determination that claimant had significant osteoarthritis.

The mechanism for a work injury is sometimes cloudy. As noted above, claimant provided two different explanations of how his work injury occurred. This Board Member understands the ALJ's conundrum. Does that negate the fact he suffered a work injury? This Board Member thinks not.

If claimant's mechanism of injury was repetitive work activities, he proved he sustained a personal injury by repetitive trauma. His repetitive job task of lifting five-gallon buckets of foam concentrate weighing 60 to 65 pounds was a viable mechanism of injury for a partially torn rotator cuff. As noted above, Dr. Prostic opined claimant's repetitive work activities were the prevailing factor for his injury and need for medical treatment.

On the other hand, if claimant's mechanism of injury was a single traumatic accident, he proved he sustained a personal injury by accident. Claimant testified his right shoulder injury resulted from a traumatic accident. Dr. Jones, as noted above, opined claimant's work accident was the prevailing factor for his injury and need for medical treatment. The accident as described by claimant was a viable mechanism of injury for a partially torn rotator cuff.

There is sufficient evidence in the record to establish claimant suffered a personal injury by accident arising out of and in the course of his employment. His testimony that his work activities caused his right shoulder pain is uncontroverted. Claimant, as a result of his work injury, suffered a right shoulder injury as evidenced by the post arthrogram MRI.

The Kansas Workers Compensation Act provides that a work injury must result from an accident or repetitive trauma. This Board Member finds credible claimant's testimony that he had a traumatic accident. Claimant testified he immediately told his wife and his supervisor about injuring his shoulder. He also told Dr. Jones that he injured his right shoulder in a single incident. At this juncture of the proceedings, the undersigned finds claimant sustained a traumatic accident.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, the undersigned Board Member reverses and remands the September 9, 2016, Preliminary Hearing Order entered by ALJ Roth with instructions to order medical treatment the ALJ deems necessary to cure or relieve the effects of claimant's injuries.

IT IS SO ORDERED.

Dated this ____ day of November, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Steven M. Roth, Administrative Law Judge

[7] K.S.A. 2015 Supp. 44-534a.

[8] K.S.A. 2015 Supp. 44-555c(j).